152253
~~152253~~

113418

REDACTED VERSION*

Matter of: Daun-Ray Casuals, Inc.

File: B-255217.3; B-255217.4

Date: July 6, 1994

Joel R. Feidelman, Esq., James J. McCullough, Esq., and Brian "D" Henretty, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Dennis J. Riley, Esq., Jared H. Silberman, Esq., Craig A. Holman, Esq., Elliott & Riley, for Wind Gap Knitwear, Inc., an interested party.
Catherine C. Morris, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to conduct meaningful discussions by not advising offeror of adverse reports regarding its past performance is sustained where the agency concedes that discussions were not held and the record does not clearly demonstrate that the protester was not prejudiced as a result of the failure.

DECISION

Daun-Ray Casuals, Inc. protests the award of a contract to Wind Gap Knitwear, Inc. pursuant to request for proposals (RFP) No. DLA100-93-R-0207, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center, for 277,980 polypropylene undershirts for use in cold weather. Daun-Ray argues that the award to Wind Gap was improper because, among other things, the agency failed to hold meaningful discussions with Daun-Ray regarding its past performance.

We sustain the protest.

---

*This decision was issued on July 6, 1994, and contained proprietary and source selection sensitive information subject to a General Accounting Office protective order. Since all parties have waived any objection to its release, this decision is now removed from the coverage of the protective order.

BACKGROUND

The Initial Competition

This RFP was issued on April 29, 1993, as a small business set-aside for the purchase of a base quantity of 277,980 polypropylene cold weather undershirts, with an optional quantity of an additional 277,980 undershirts. The RFP anticipated award of a fixed-price contract to the offeror whose offer was evaluated "most advantageous to the government, cost or price, technical quality and other factors considered." The RFP also advised that option quantity prices would be combined with the offeror's base quantity price to determine the best value to the government. Further, the RFP advised offerors that technical merit would be more important than price, but noted that as proposals became more equal in merit, price would become more important.

Section M of the RFP set forth the following evaluation factors, in descending order of importance: (1) product demonstration model; (2) past performance; (3) manufacturing plan; and (4) quality assurance plan. Offerors were advised that each evaluation factor, as well as the overall proposal, would be rated highly acceptable (HA); acceptable (A); marginally acceptable (MA); or unacceptable (UA).

Offerors were also advised in section M of the RFP that the evaluation would examine past performance in connection with determining the credibility of proposals and each offeror's relative capability. To assess past performance, the agency stated that it would review information included in the proposal, as well as information available from past and current customers, other government agencies, and consumer protection organizations. According to the RFP, this review would consider:

> "the offeror's record of conforming to [g]overnment specification requirements and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's businesslike concern for the interests of the customer."

Further, the RFP stated in section M that "[o]fferors will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response, or lack thereof will be taken into consideration."

Four offerors submitted proposals by the initial closing date. After an initial price and technical evaluation, the proposals--listed from lowest priced to highest--were rated as follows:

	Product Model	Past Perf.	Mfg. Plan	QA Plan	Total Rating
Wind Gap	A	MA	A	A	MA
Company A	A	A	A	A	A
Daun-Ray	A	A	A	A	A
Company B	A	A	A	A	A

The three lowest-priced offers were included in the competitive range; company B's offer was excluded because of its significantly higher price.

Negotiations were opened with the three competitive range offerors and each was asked to provide cost data to support its proposed price. In addition, Wind Gap was given an opportunity to address past performance deficiencies because of its marginally acceptable rating in the area of past performance. According to the agency, Wind Gap had two contracts in the previous 3 years with the Defense Personnel Support Center, and Wind Gap's performance on both contracts was delinquent.

During these negotiations, Daun-Ray was not given an opportunity to discuss its past performance because it received an acceptable rating under this category. According to the agency, Daun-Ray had completed seven contracts in the 3 previous years, with four of the contracts completed on time. The agency noted that of the three delinquent contracts, one delinquency "was excusable, one inexcusable, and one was not held against Daun-Ray because it was the subcontractor and the delinquency was caused by the prime contractor."

After discussions were completed, the agency requested and received revised proposals and cost data. Although the proposals were reevaluated, the technical evaluation ratings remained the same, and the agency requested best and final offers (BAFO) by August 27. The BAFO unit prices--evaluated by averaging the unit price offered for both the basic and option quantities--and the total prices for both the base and option quantities were as follows:

Wind Gap	$8.75	$4,864,650
Daun-Ray	8.995	5,000,860
Company A	9.105	5,062,016

After considering the results of the technical evaluation and the proposed prices--and specifically, after considering Daun-Ray's acceptable past performance rating compared to

Wind Gap's marginally acceptable rating--the contracting officer determined that Daun-Ray's offer presented the best value to the government. On September 17, the two unsuccessful offerors were notified of Daun-Ray's selection for award. On September 22, Wind Gap filed a challenge to Daun-Ray's size status with the Small Business Administration (SBA), and on October 4, Wind Gap filed a bid protest with our Office.

The Wind Gap Protest

In its protest to our Office (B-255217.1), Wind Gap argued that the agency improperly evaluated its offer, and that it was unreasonable to conclude that Daun-Ray offered the best value to the government. Although the protest was filed prior to award, the agency decided to proceed with performance notwithstanding the protest, and on November 3, Daun-Ray was awarded the contract.

After receipt of the agency report prepared in response to the protest, and receipt of the protester's comments on the report, we prepared written questions for the record identifying additional information needed to prepare a decision. One of these questions involved the agency's assessment of Daun-Ray's past performance on three specific contracts. In preparing a response, the agency concluded that a clerical error had caused a mistake in the evaluation of one of Daun-Ray's earlier contracts, and that the contract--originally evaluated as excusably delinquent--should have been evaluated as inexcusably delinquent.

After identifying the error, the agency decided to reevaluate the past performance portion of Daun-Ray's technical proposal. The contracting officer concluded that the original assessment of Daun-Ray as delinquent on one out of seven contracts performed in the previous 3-year period was incorrect. Instead, the contracting officer decided that Daun-Ray was delinquent in making timely deliveries on seven out of nine contracts performed in the previous 3-year period. For three of the nine contracts at issue--DLA100-90-C-0502 (contract -0502), DLA100-90-C-0433 (contract -0433), and DLA100-91-C-0400 (contract -0400)--the agency concluded that if the evaluators had considered correct data, Daun-Ray would have received a score of marginally acceptable.

---

*On October 18, the SBA decided that Daun-Ray qualified as a small business, and denied Wind Gap's size protest.

**The agency explained that the information regarding the remaining contracts was not conclusive about the cause for

(continued...)

As a result of this reassessment, the contracting officer decided that: (1) Daun-Ray's rating under the past performance evaluation criterion should be downgraded from acceptable to marginally acceptable; (2) Wind Gap, and not Daun-Ray, presented the best value to the government; and (3) the agency should terminate Daun-Ray's contract and award the contract to Wind Gap. Also, since the agency concluded that the information already available in its files established that the delinquencies on these three contracts were inexcusable--and since it concluded that Daun-Ray would be unable to effectively rebut that information in discussions--the agency decided there was no need to reopen discussions with Daun-Ray before terminating its contract and awarding to Wind Gap.

On February 2, 1994, the agency orally notified Daun-Ray of its decision regarding the reevaluation and reaward, and on February 16, Daun-Ray filed this protest. After deciding to proceed with award notwithstanding the protest, see Federal Acquisition Regulation (FAR) § 33.104(b)(1), the agency awarded a contract to Wind Gap on March 9. As a result of a settlement agreement between Wind Gap and the agency to resolve the Wind Gap protest, the agency agreed that Wind Gap would receive the basic contract quantity of 277,980 undershirts, and would receive the option amount--100 percent of the basic amount--after resolution of Daun-Ray's protest to our Office.

MEANINGFUL DISCUSSIONS

Daun-Ray argues that the decision to terminate its contract and award to Wind Gap was unreasonable because the agency failed to hold discussions with Daun-Ray regarding the evaluation of its past performance. According to Daun-Ray, the agency's failure to hold discussions violated the Competition in Contracting Act, the terms of the FAR and the express terms of the RFP. Daun-Ray also argues that the agency's failure to hold discussions resulted in the inclusion of erroneous information in the evaluation of Daun-Ray's past performance, and that these errors led to an unreasonable cost/technical tradeoff decision.

In response, the agency acknowledges that it chose not to discuss with Daun-Ray the negative information relied upon to downgrade the firm from acceptable to marginally acceptable under the past performance evaluation factor, but argues that Daun-Ray was not prejudiced by the downgrading

---

** (...continued)
the delinquency, and therefore, it based its decision to downgrade Daun-Ray only on the three contracts identified above.

of its proposal without discussions. Specifically, the agency explains that since Daun-Ray paid compensation to the agency to negotiate extensions in the delivery schedule on the three delinquent contracts at issue, and thus acknowledged that the delivery delinquencies were legally inexcusable, Daun-Ray could offer nothing further during discussions that would result in an evaluation assessment higher than marginally acceptable. Alternatively, in supplemental filings, the agency argues that: (1) the RFP provision advising that offerors would receive an opportunity to respond to unfavorable past performance reports does not apply to information provided by the agency itself, as opposed to information provided by outside sources; and (2) Daun-Ray risked an unfavorable evaluation by not including explanatory information about the negative areas of its past performance in its initial proposal.

We have reviewed the contentions of the protester, the interested party, and the agency, including the analysis of Daun-Ray's performance on past contracts, and for the reasons set forth below, we conclude that the agency was required to discuss with Daun-Ray the negative reviews of its past performance. We also think that Daun-Ray was prejudiced by the agency's failure to hold such discussions.

Generally, agencies are required to hold discussions with all offerors whose proposals are in the competitive range for award. 10 U.S.C. § 2305(b)(4) (Supp. V 1993); FAR § 15.610; Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354. Although discussions with offerors need not be all-encompassing, they must be meaningful, which means that an agency is required to point out weaknesses, excesses, and deficiencies in proposals unless doing so would result in technical transfusion or technical leveling. FAR § 15.610(c), (d); Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527.

As an overlay onto the general requirement for discussions, the RFP here included a clause setting forth the importance of an offeror's past performance under the evaluation scheme, and advising offerors they would receive an opportunity to reply to unfavorable past performance reports. In addition, the clause provided guidance to offerors about the standards and approach the agency would use in its assessment. The clause stated, in relevant part:

> "Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The [g]overnment is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction

> and timely delivery of quality goods and services at fair and reasonable prices. This is a matter of judgment. Offerors will be given an opportunity to address especially unfavorable reports of past performance, and the offeror's response or lack thereof will be taken into consideration." (Emphasis added.)

As an initial matter, we find unpersuasive the agency's contention that this clause has no application to Daun-Ray because the unfavorable reports were received from within the agency and not outside it. On its face, there is no language in the clause that limits its application to unfavorable reports from outside the agency. Without such limits, offerors could reasonably expect they would receive an opportunity to address reports that were "especially unfavorable." Since the DPSC contract data used here led the agency to downgrade Daun-Ray's evaluation rating and terminate its contract, we also think that the reports were sufficiently unfavorable to trigger the operation of the clause.

With respect to prejudice, we find the agency's contentions unpersuasive. In a recent decision (also involving DPSC) interpreting a similar past performance evaluation clause advising offerors they would be given an opportunity to address "especially unfavorable" reports of past performance, our Office concluded that:

> "Where, as is here conceded, an agency fails in its duty to hold meaningful discussions and argues that the protester was not prejudiced as a result of that failure, we will not substitute speculation for discussions and we will resolve any doubts in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest." (Citations omitted.)

Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108. In other words, we will deny a protest only where it is clear from the record that the protester was not prejudiced. Id.

Based on our review of the record, we conclude that there is a reasonable possibility of prejudice. For example, in its initial report the agency explained that Daun-Ray was downgraded because three of its earlier contracts were extended due to inexcusable delay, and because Daun-Ray "acknowledged the inexcusability of the delay and offered consideration to the government." In response, Daun-Ray explained that for two of the contracts, -0400 and -0502, the delivery delays were linked. Daun-Ray explains that it had already delivered the base quantity under contract -0502

when the government exercised the 100-percent option for that contract, and, at the same time, awarded Daun-Ray contract -0400. At that point, Daun-Ray's fabric supplier, Burlington Industries, was unable to provide sufficient fabric to meet both production schedules. Daun-Ray further explains that it contacted the two contracting officers involved and met with both to negotiate a revised delivery schedule satisfactory to both customers. Since, as a legal matter, the delays were not due to government action, Daun-Ray agreed to provide compensation to the government as part of its negotiation to revise the delivery schedules in these contracts.

While there is no dispute that Daun-Ray's delivery delays under these contracts involved issues for which Daun-Ray, and not the government, must be held responsible, whether an offeror made a timely delivery under an earlier contract was only one of the elements of past performance identified in the evaluation clause. As quoted above, the past performance clause used here advised offerors that the evaluation would include a subjective assessment of all relevant facts and circumstances, and would not be based on absolute standards of acceptable performance. Specifically, the clause stated that the evaluators would also consider information about past workmanship, adherence to government specifications, reasonable and cooperative behavior, commitment to customer satisfaction, and the "offeror's businesslike concern for the interests of the customer."

Daun-Ray, a small business, was purchasing fabric from a large and reputable supplier. Based on Daun-Ray's explanation, when it learned of its supplier's difficulties, it contacted the agency to advise it of the problem and to seek a constructive resolution. The agency concedes that Daun-Ray took these actions and that they were the actions of a responsible contractor. Given Daun-Ray's detailed explanations regarding the reasons for its past delinquencies, we cannot close the door on the possibility that the agency--had it given Daun-Ray the opportunity to respond--might have concluded that the company's actions reflected other indicia of successful past performance specifically set forth in the clause. There is a reasonable possibility that DLA's rote recitation of undisputed delinquencies, without response from the protester, prejudiced Daun-Ray in the reevaluation of the company's proposal.

As a final matter, we also reject DLA's contention that Daun-Ray should have anticipated the negative past performance reports and included explanatory information with its proposal. Not only is this contention in direct conflict with the plain meaning of the RFP's statement that offerors will have an opportunity to rebut such reports,

See American Dev. Corp., B-251876.4, July 12, 1993, 93-2 CPD ¶ 49, but we note that Daun-Ray's view of its past performance is very different from DPSC's view. In light of the fact that Daun-Ray does not view its past performance in a negative light, it is unreasonable to expect that Daun-Ray should know in advance to respond to the agency's concerns about past performance in the initial proposal. Id.

OTHER PROTEST ISSUES

In its two supplemental protests, Daun-Ray argues that the agency improperly awarded a different quantity of undershirts to Wind Gap than the quantity set forth in the RFP--i.e., awarded both the base and option quantities at one time--and argues that the agency failed to consider the larger number of contracts performed by Daun-Ray in concluding that Daun-Ray and Wind Gap were equal in terms of past performance. In view of our recommendation below that the agency conduct discussions with Daun-Ray and, based on those discussions, reconsider its award decision, Daun-Ray's challenge to DLA's agreement to award the option quantity is academic and need not be resolved. This decision also resolves Daun-Ray's challenge that the cost/technical trade-off decision failed to consider the difference in the number of contracts performed by the two companies. Since we sustain Daun-Ray's challenge to the agency's failure to give Daun-Ray an opportunity to respond to the negative reports regarding its past performance, the agency will need to make a new cost/technical tradeoff decision upon completing its reassessment of Daun-Ray after holding discussions regarding its past performance.

CONCLUSIONS AND RECOMMENDATION

We conclude that DLA failed to hold meaningful discussions with Daun-Ray regarding its past performance after the agency reevaluated Daun-Ray's proposal in response to the Wind Gap protest. We also conclude that Daun-Ray was prejudiced by the agency's failure in this area.

We recommend that the agency conduct discussions with Daun-Ray concerning its past performance, reevaluate the proposal in accordance with those discussions, and reconsider the cost/technical tradeoff decision. Since DLA has elected to proceed with performance of this contract notwithstanding the protest, as permitted by FAR § 33.104(b)(1), we recommend that if Daun-Ray is found to offer the greatest value to the government, the agency either terminate the remainder of Wind Gap's contract and reaward to Daun-Ray, or if termination is not practicable, recompete the option quantity included in this contract and compensate Daun-Ray for its proposal preparation costs.

DLA should reimburse Daun-Ray for its costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), Daun-Ray's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States